No. 14515

United States
Court of Appeals
for the Ninth Circuit

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,

Appellants.

vs.

WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Appellees.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 90)

Appeals from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-24-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Northern District of California, Southern Division

Civil Action No. 33514

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, Receiver,

Plaintiffs,

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Defendants.

BILL OF COMPLAINT

To the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division:

The Bill of Complaint (hereinafter referred to as the complaint) of Western Pacific Railroad Corporation and Alexis I. du Pont Bayard, Receiver, respectfully shows:

First: Western Pacific Railroad Corporation is a corporation duly organized and existing under the laws of the State of Delaware, and Alexis I. du Pont Bayard is Receiver of Western Pacific Railroad Corporation duly appointed by the Chancery Court of the State of Delaware in and for the County of New Castle (hereinafter referred to as the plaintiffs); and both of said plaintiffs are citizens and residents of the State of Delaware.

Second: The Western Pacific Railroad Company was the original petitioner in the reorganization proceedings under Section 77 of the Bankruptcy Act numbered 26591-S on the docket of this Court, the history of which, so far as material to this complaint and except as amplified herein, is judicially stated and found by the Honorable Louis E. Goodman, United States District Judge, in a certain action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508—Civil," to be as follows:

"Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad company, herein referred to as the 'debtor'; defendant, the reorganized subsidiary is The Western Pacific Railroad Company.

"Statement of Facts

"Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act (11 USC 205) and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission, 233 ICC 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value

and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Supreme Court reversed the Circuit Court and affirmed the order of the District Court (318 U. S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor (318 U. S. 508, 509).[1] Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things. the plain-

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tiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actually made until April, 1944, because of an unsuccessful litigative[2] attempt to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

"During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was $4,144,828. Later in 1943, after the filing of the 1942 return and payment of

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"[2]Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944).

the tax, the tax attorneys for defendant 'discovered' Section 123 of the Revenue Act of 1942 (26 USC 23(g)4).[3] They proposed what they denoted a 'paradoxical' theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some $75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this $75,000,000 loss in 1943, could be 'carried back' to 1942 (sec. 122(b)(1) of the Internal Revenue Code) and part could be 'carried over' to 1944 (Sec. 122(b)(2) of the Internal Revenue Code).

"Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some $17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the $75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show

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"[3]'Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset.' (Subsection 4 of Sec. 23g.) By this subsection, losses resulting from worthlessness of stock of an affiliated became operating losses instead of capital losses as theretofore.

no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

"Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.[4]

"On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain

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"[4]The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commission or Court.

stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consolidated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

"On December 17, 1947, plaintiff filed a supplemental bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated return for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control.'

"In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some $17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

"After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

"The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

"A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

"But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff's claim as an equitable demand.

"Discussion

"The income tax picture presented is bizarre indeed. It is 'paradoxical,' as the defendant's tax attorneys put it.[5] The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of $21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization

"[5]In a letter dated May 20, 1943 (plff. Ex. 50), addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff's stock loss in the debtor to offset debtor's profits, saying: 'This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless.' (Interlineation supplied.)

Court to be valueless. But the tax attorneys for the defendant conceived a 'paradoxical' plan. They decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder[6] affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942 (26 USC Sec. 23(g)4).[7] Thus, part of the lost $75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the $21,346,567 tax would be paid.

"This was more than mere tax 'saving'; it amounted to a complete tax 'escape.' But the debtor had already paid $4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of 'carry-back,' part of the $75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or 'escape' offered for the three years in question, the claim for refund was waived and the Commissioner then

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"[6]Sec. 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

"[7]See footnote # 3.

accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that the debtor paid $4,144,828 taxes to the United States in order to escape the $21,346,567 previously mentioned, or a net saving or 'escape' of $17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (Sec. 23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid $4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.[8]

"How the amendment to the statute, Sec. 23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

"Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These

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"[8]It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss could have been a true factor affecting the tax settlement inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns."

limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses, 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938."

Third: As the result of the various steps outlined in the foregoing quoted part of the opinion of the District Court, which was formally adopted by the District Court as its Findings of Fact, a net fund amounting to $17,201,739 is in the possession of the Western Pacific Railroad Company, having been transferred to it by Thomas M. Schumacher and Sidney Ehrman, Trustees, subject to an Assumption Agreement whereby it assumed:

"Generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's property by the said Trustees, or their conduct of the debtor's business."

Fourth: The Plan of Reorganization of the debtor

referred to in the opinion quoted above was certified to the District Court by the Interstate Commerce Commission June 21, 1939, and was approved by the District Court August 15, 1940, at a time when a loss resulting from the worthlessness of securities owned by a holding corporation, in which category petitioner Western Pacific Railroad Corporation belongs, could be offset only against capital gains occurring in the same tax period, but on October 21, 1942, Congress inserted in the following provision of the Internal Revenue Code forming part of Section 23 the paragraph thereof numbered (g)(4):

"Deductions from gross income. In computing net income there shall be allowed as deductions:

"* * *

"(g)(2) Securities becoming worthless. If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange on the last day of such taxable year of capital assets.

"* * *

"(4) Stock in affiliated corporations. For the purpose of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purpose of this paragraph a corporation shall be deemed affiliated only if:

"(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and * * *"

Fifth: The enactment of the foregoing Section 23(g)(2)(4) on October 21, 1942, authorizing restoration out of consolidated taxable income of the lost capital of the parent invested in the securities of a subsidiary could not have been reasonably anticipated or foreseen by the Interstate Commerce Commission on June 21, 1939, when it certified the Plan of Reorganization to this Court, and on October 10, 1946, the plaintiffs Western Pacific Railroad Corporation filed in this Court the suit hereinbefore referred to (in which suit at a subsequent stage Alexis I. du Pont Bayard was added as an additional plaintiff) against Western Pacific Railroad Company, the debtor in the Bankruptcy proceedings 26591-S and the obligor under the Assumption Agreement hereinbefore mentioned, and also against the additional parties named in the subjointed footnote as defendants,* praying an accounting by the reorganized Western Pacific Railroad Company in respect of the use under federal consolidated income and excess profits tax returns of the plaintiffs' tax credit in the amount necessary to effect a relinquishment of its taxable income up to $17,201,739 under Section 23(g)(2) and (4) set out above. The subsequent history of this accounting proceeding and the antecedent history of Section 77 proceeding for the reorganization of the debtor

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*The Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company, and Delta Finance Company, Ltd.

Railroad Company are within the judicial knowledge of this Court, as revealed by the official reports in chronological order cited below.*

Sixth: Under the Internal Revenue Code and the Regulations of the Treasury of the United States thereunder, the plaintiff Western Pacific Railroad Corporation was free to join or refuse to join in consolidated returns as it saw fit, and was under no statutory duty to file consolidated returns and was free to make its own decision whether to file or not to file on the basis of its own interests.** But the Court of Appeals held (Judge Fee dissenting) in response to repeated assertions of the defendant Railroad Company that it had not paid its pre-reorganization debts and that the plaintiff Western Pacific Railroad Corporation was under an equit-

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*Western Pacific Railroad Company Reorganization, 230 I.C.C. 61; 233 I.C.C. 409; in re Western Pacific Railroad Company, No. 26591-S, 34 F. Supp. 493; Western Pacific Railroad Company vs. Reconstruction Finance Corporation, et al., and four other cases, No. 9712, 124 Fed. 2d 136 (1941); Ecker and others vs. Western Pacific Railroad Corporation, et al., 318 U. S. 418 (1943); Western Pacific Railroad Corporation vs. Western Pacific Railway Company, et al., No. 26508, 85 F. Supp. 869 (1949); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 197 Fed. 2d 994 (1951); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 345 U. S. 247 (1953); and after remand 205 Fed. 2d 374, 206 Fed. 2d 495.

**Treasury Regulation 109, Sec. 23—16a and 11a —Duke Power Company v. Commission, 44 Fed. 2d 543, 545 (4 Circuit).

able duty as fiduciary to join in consolidated returns and thereby donate its tax credit and the avails thereof to the reorganized defendant Railroad Company because its creditors had not been fully paid. The following is from the prevailing opinion written by Judge Byrne:

"The Corporation was the sole owner of the subsidiary's (the debtor's) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the interests of the creditors and holders of other securities. Consolidated Rock Products Co. v. Du Bois (312 U. S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its co-operation then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

The plaintiffs are bound by and accept this determination of the Court of Appeals, and their purpose and objective in filing this successoral complaint is to provide the essential machinery or medium for implementing it and requiring the reorganized Western Pacific Railroad Company, as in duty bound under its Assumption Agreement as the trustee-custodian of the fund also to accept it and to carry it into effect.

Seventh: The doctrine of Consolidated Rock Products Company vs. Du Bois (312 U. S. 510) is that junior interests in a bankruptcy or equity administration proceeding cannot be given any part

or securities representing any part of the debtor's estate unless and until full compensatory treatment is given for the entire bundle of rights which the senior creditors surrender. In the proceeding 26591-S, the Plan of Reorganization approved by this Court and by the Supreme Court of the United States allotted to the senior creditors, in full satisfaction of their claims, securities representing in the determination of the Interstate Commerce Commission and of the Court the full value of their claims without resorting to an excess value of the senior liens which they surrendered; and thereupon gave a residue valued at $5,964,296 to creditors secured by liens wholly subordinate to the liens held by the senior creditors. It is accordingly res adjudicata in the proceeding 26591-S that any fiduciary duty of the plaintiffs Western Pacific Railroad Corporation to donate its special tax credit, or taxes remitted there against, under Section 23(g)(2)(4) is one to be exercised for the exclusive benefit of the creditors of the debtor Western Pacific Railroad Company left unprovided for or inadequately provided for under the Plan of Reorganization approved by the Supreme Court of the United States in Ecker vs. Western Pacific Railroad Corporation, 318 U. S. 448.

Eighth: In the exercise of its jurisdiction in the proceedings 26591-S, the Interstate Commerce Commission determined the amount of the indebtedness of the debtor as of January 1, 1939, for which full compensatory treatment was not accorded under the

Plan of Reorganization to be $13,914,530, of which $6,249,750 was due and owing to the A. C. James Company; $7,609,370 was due and owing to the plaintiff Western Pacific Railroad Corporation, and $60,410 was due and owing to Western Realty Company. The claim of the A. C. James Company was liquidated in part out of collateral pledged by the debtor (junior lien bonds of the debtor or new securities issued thereagainst and substituted therefor) and the unliquidated balance as shown by an exhibit introduced by the defendant Railroad Company in said action "No. 26508 Civil" is $3,495,000 but is subject to adjustment bringing it up to $3,683,175.* In addition to the creditor claims so determined and allowed by the Interstate Commerce Commission the claim of plaintiff Western Pacific Railroad Corporation as owner of all of the debtor's preferred stock was allowed in the amount in excess of $40,000,000.**

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*In the exhibit introduced by the defendant Railroad Company to establish the deficiency of the A. C. James Company, it was charged with 37,635 shares of new common stock at $62 instead of its true currency value of $57 as fixed by the treatment accorded the senior lien creditors—exhibit (defendant's) No. 33, record page 2022.

**A secured claim of Railroad Credit Corporation was fully liquidated by the use of common stock pledged at $62 per share and certain Accommodation Collateral supplied by Western Pacific Railroad Corporation, the unused balance of which Accommodation Collateral was restored to Western Pacific Railroad Corporation under a decree of the Chancery Court of the State of Maryland.

Ninth: As hereinbefore alleged the plaintiffs are filing this complaint as an independent or successoral action in equity to provide an essential machinery or medium for implementing the decree or judgment in said action "No. 26508 Civil" and for an administration of the trust arising thereunder or in consequence thereof and as a civil action in equity between citizens of different states, viz., the plaintiffs Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, both being citizens and residents of the State of Delaware and Western Pacific Railroad Company, a corporation, organized and existing under the laws of the State of California, as a defendant, wherein the amount in controversy greatly exceeds $5,000.00.

Tenth: James Foundation of New York, Inc., successor to the creditor position of A. C. James Company, is a corporation of the State of New York; and Western Realty Company is a corporation of the State of Colorado, and each being an unsatisfied creditor of the debtor, and as such a beneficiary of the trust created as hereinbefore alleged, is an interested but not an indispensible party to this proceeding, and being such both also have been named as parties defendant herein.

Eleventh: The reason why this complaint was not filed at a earlier date is that the status of the $17,201,739 fund in the custody of the reorganized Western Pacific Railroad Company, defendant herein, was not finally established until the denial of the second petition for certiorari at the present

term of the United States Supreme Court in said action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Rr. Co., et al., No. 26508-Civil."

Twelfth: While said second petition for certiorari was pending in the United States Supreme Court on application for rehearing, the plaintiff receiver wrote the President of the defendant Railroad Company as follows:

"If the Supreme Court denies our pending petition for a rehearing of the application for certiorari and establishes the position taken by your counsel throughout the litigation that the $17,000,000 fund in your custody is a trust fund for the satisfaction of the unpaid creditors of your company (pre-reorganization) it is our purpose to apply to the Bankruptcy Court for a proper application of the fund to that purpose. I am writing this in advance to put you and your directors on notice of our position."

No reply to or acknowledgment of said communication has been received by the plaintiffs but they are informed and allege that the defendant Railroad Company proposes to divert the fund to purposes other than the payment and satisfaction of claims of partially paid and wholly unpaid (pre-reorganization) creditors of the defendant Railroad Company and to utilize it for the enrichment of the creditors, and successors in interest of creditors that received full compensatory treatment under the Plan of Reorganization.

Wherefore, the plaintiffs pray:

(1) That this Court make cognizance of this cause and grant unto them a writ of subpoena of the United States directed to Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, named as defendants herein, service upon the two defendants last named to be made by the Marshal of the District wherein personal service may be effected;

(2) That this Court grant unto the plaintiff a judgment or decretal order adjudging that the fund of $17,201,739 in the possession of the reorganized Western Pacific Railroad Company is held by it subject to the Assumption Agreement executed by it pursuant to the order and decree of this Court in the proceeding 26591-S in the order of their respective priorities and for the interests junior thereto as heretofore determined by the Interstate Commerce Commission;

(3) That this Court enter a preliminary order placing said fund of $17,201,739 in judicial custody and requiring and directing the defendant Western Pacific Railroad Company to hold said fund subject to the further order or orders of this Court which may include an order or orders providing therefrom currently for the expenses of the plaintiffs and their attorney and counsel in resisting the threatened conversion thereof; and

(4) That the plaintiffs may have such further relief by way of declaratory judgment or decree of

injunction, temporary or permanent, or both, or otherwise as to the Court may seem meet.

Dated April 21, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, RECEIVER,

Plaintiffs;

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed April 22, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

Civil Action No. 33514

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AMENDED BILL OF COMPLAINT

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Second: The Western Pacific Railroad Company was the original petitioner in the reorganization proceedings under Section 77 of the Bankruptcy Act numbered 26591-S on the docket of this Court, the history of which, so far as material to this complaint and except as amplified herein, is judicially stated and found by the Honorable Louis E. Goodman, United States District Judge, in a certain action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508—Civil," to be as follows:

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and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff's equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941 (124 F. 2d 136). In 1943 the Supreme Court reversed the Circuit Court and affirmed the order of the District Court (318 U. S. 448). It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor (318 U. S. 508, 509).[1] Thereafter, the plan of reorganization was, in accordance with the statutory provisions (11 USC 205e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee designated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e., the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things, the plain-

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"[1]See in re Denver & R. G. W. R. Co. 10 Cir. 150 Fed. 2d 28 and R. F. C. v. D. & R. G. R. Co. 328 U. S. 495, where similar holdings upon similar contentions were made.

tiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December, 1943. The transfer of the stock was not actually made until April, 1944, because of an unsuccessful litigative[2] attempt to prevent the same. During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. The practice of filing the consolidated returns continued throughout the reorganization period. The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

"During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942. A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was $4,144,828. Later in 1943, after the filing of the 1942 return and payment of

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"[2]Bryant v. Western Pac. R. Corp. 35 A. 2d 909 (Del. Ch. Feb. 10, 1944).

the tax, the tax attorneys for defendant 'discovered' Section 123 of the Revenue Act of 1942 (26 USC 23(g)4).[3] They proposed what they denoted a 'paradoxical' theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some $75,000,000) in the operating railroad company (debtor), might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this $75,000,000 loss in 1943, could be 'carried back' to 1942 (sec. 122(b)(1) of the Internal Revenue Code) and part could be 'carried over' to 1944 (Sec. 122(b)(2) of the Internal Revenue Code).

"Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944, were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some $17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the $75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show

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"[3] 'Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset.' (Subsection 4 of Sec. 23g.) By this subsection, losses resulting from worthlessness of stock of an affiliated became operating losses instead of capital losses as theretofore.

no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defendant and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. The nature and basis of this compromise settlement will be hereafter more fully discussed.

"Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946, filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.[4]

"On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain

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"[4]The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commission or Court.

stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consolidated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

"On December 17, 1947, plaintiff filed a supplemental bill of complaint, wherein the consummation of the settlement and compromise was set forth. It was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated return for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control.'

"In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some $17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

"After many preliminary motions were made and disposed of, and after the filing of answers by the defendant and after pre-trial conferences, the cause finally came on for trial.

"The trial itself consumed 13 days; the proceedings are set forth in 1700 pages of transcript; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence.

"A number of special defenses were pleaded and testimony and exhibits offered at the trial in support thereof.

"But I am of the opinion, in view of the fact that the cause is concededly of equitable cognizance, that decision must depend upon the essential righteousness of plaintiff's claim as an equitable demand.

"Discussion

"The income tax picture presented is bizarre indeed. It is 'paradoxical,' as the defendant's tax attorneys put it.[5] The Western Pacific Railroad Company, the operating company, profitably conducted its railroad facilities in reorganization during 1942, 1943 and the forepart of 1944. Its own profit and loss records showed the debtor to be accountable to the United States in the sum of $21,346,567 income taxes for the years 1942, 1943 and the first four months of 1944. During this same period of time the plaintiff was still the legal owner of all the capital stock of the debtor, an ownership which had been declared by both the Interstate Commerce Commission and the Reorganization

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"[5]In a letter dated May 20, 1943 (plff. Ex. 50), addressed to Curry, Vice President of defendant company, tax counsel Polk set forth his idea of using the plaintiff's stock loss in the debtor to offset debtor's profits, saying: 'This is commented upon rather than suggested, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless.' (Interlineation supplied.)

Court to be valueless. But the tax attorneys for the defendant conceived a 'paradoxical' plan. They decided that they would file, pursuant to Section 141 of the Internal Revenue Code and the Treasury Regulations issued thereunder[6] affiliated or consolidated returns on behalf of the parent company and its subsidiaries and in them set up the plaintiff's stock loss (i.e., its ownership in the debtor) as an income tax deduction against the operating profits. Ostensibly they found their authority for so doing in Section 123 of the Revenue Act of 1942 (26 USC Sec. 23(g)4).[7] Thus, part of the lost $75,000,000 stockholding of the plaintiff in the debtor was applied as an offset to operating profits during each of the three years in question to the end that no part of the $21,346,567 tax would be paid.

"This was more than mere tax 'saving'; it amounted to a complete tax 'escape.' But the debtor had already paid $4,144,828 income taxes for the fiscal year 1942 and it had filed a claim for refund of such taxes upon the ground that it owed no taxes for 1942 if, on the theory of 'carry-back,' part of the $75,000,000 stock loss was a proper deduction. So in order to make the far larger saving or 'escape' offered for the three years in question, the claim for refund was waived and the Commissioner then

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"[6]Sec. 141 Internal Rev. Code permits the filing of a consolidated return by affiliated corporations. Regulations 104 and 110 contain detailed requirements for such filing.

"[7]See footnote # 3.

accepted the returns for 1942-1943 and the fore part of 1944. The effect of this was that the debtor paid $4,144,828 taxes to the United States in order to escape the $21,346,567 previously mentioned, or a net saving or 'escape' of $17,201,739. To all of this the Commissioner agreed. It was stated to be a compromise because of some question as to the date of definite ascertainment of the stock loss. The Commissioner apparently agreed that, under the 1942 amendment (Sec. 23(g)4), it was proper to offset the capital stock loss against the net operating gain, and the taxpayer paid $4,144,828 to resolve some alleged uncertainty as to the date of ascertainment of the stock loss.[8]

"How the amendment to the statute, Sec. 23(g)4), could have been availed of by the debtor is, mildly stated, puzzling, if not downright amazing. Its application in an orthodox case is understandable. The theory of deducting a loss in an economic aggregation of affiliated corporations, where one unit gains and the other unit loses, has been recognized and approved by Congress and the Courts.

"Prior to the Revenue Act of 1938, losses resulting from the worthlessness of stocks and bonds were deductible from ordinary income and were not subject to the so-called capital-loss limitations. These

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"[8]It is not at all clear to the Court how the alleged uncertainty as to the date of ascertainment of the stock loss could have been a true factor affecting the tax settlement inasmuch as any such uncertainty would, if it existed, as well apply with respect to the 1943 and 1944 returns."

limitations, that is that a capital loss could only offset a capital gain, had applied only to sales and exchanges, with the result that it was more advantageous to allow stocks, that might become worthless, to become worthless rather than to sell them. By the 1938 Act losses sustained by reason of the worthlessness of securities were treated as if they resulted from the sale or exchange of capital assets and thus were subject to the limitations applying to deductions in the form of capital losses, 26 USC 23(g)4, which was Section 123 of the Revenue Act of 1942, accorded losses on worthless stocks held by a taxpayer in affiliated corporations the same treatment accorded losses from all worthless securities prior to the Revenue Act of 1938."

Third: As the result of the various steps outlined in the foregoing quoted part of the opinion of the District Court, which was formally adopted by the District Court as its Findings of Fact, a net fund amounting to $17,201,739 is in the possession of the Western Pacific Railroad Company, having been transferred to it by Thomas M. Schumacher and Sidney Ehrman, Trustees, subject to an Assumption Agreement whereby it assumed:

"Generally any and all liabilities and obligations with respect to claims of any character whether heretofore or hereafter asserted arising out of the possession, use or operation of the debtor's property by the said Trustees, or their conduct of the debtor's business."

Fourth: The Plan of Reorganization of the debtor

referred to in the opinion quoted above was certified to the District Court by the Interstate Commerce Commission June 21, 1939, and was approved by the District Court August 15, 1940, at a time when a loss resulting from the worthlessness of securities owned by a holding corporation, in which category petitioner Western Pacific Railroad Corporation belongs, could be offset only against capital gains occurring in the same tax period, but on October 21, 1942, Congress inserted in the following provision of the Internal Revenue Code forming part of Section 23 the paragraph thereof numbered (g)(4):

"Deductions from gross income. In computing net income there shall be allowed as deductions:

"* * *

"(g)(2) Securities becoming worthless. If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange on the last day of such taxable year of capital assets.

"* * *

"(4) Stock in affiliated corporations. For the purpose of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. For the purpose of this paragraph a corporation shall be deemed affiliated only if:

"(A) At least 95 per centum of each class of its stock is owned directly by the taxpayer; and * * *"

Fifth: The enactment of the foregoing Section 23(g)(2)(4) on October 21, 1942, authorizing restoration out of consolidated taxable income of the lost capital of the parent invested in the securities of a subsidiary could not have been reasonably anticipated or foreseen by the Interstate Commerce Commission on June 21, 1939, when it certified the Plan of Reorganization to this Court, and on October 10, 1946, the plaintiffs Western Pacific Railroad Corporation filed in this Court the suit hereinbefore referred to (in which suit at a subsequent stage Alexis I. du Pont Bayard was added as an additional plaintiff) against Western Pacific Railroad Company, the debtor in the Bankruptcy proceedings 26591-S and the obligor under the Assumption Agreement hereinbefore mentioned, and also against the additional parties named in the subjointed footnote as defendants,* praying an accounting by the reorganized Western Pacific Railroad Company in respect of the use under federal consolidated income and excess profits tax returns of the plaintiffs' tax credit in the amount necessary to effect a relinquishment of its taxable income up to $17,201,739 under Section 23(g)(2) and (4) set out above. The subsequent history of this accounting proceeding and the antecedent history of Section 77 proceeding for the reorganization of the debtor

*The Sacramento Northern Railway, Tidewater Southern Railway, Deep Creek Railroad Company, The Western Realty Company, The Standard Realty and Development Company, and Delta Finance Company, Ltd.

Railroad Company are within the judicial knowledge of this Court, as revealed by the official reports in chronological order cited below.*

Sixth: Under the Internal Revenue Code and the Regulations of the Treasury of the United States thereunder, the plaintiff Western Pacific Railroad Corporation was free to join or refuse to join in consolidated returns as it saw fit, and was under no statutory duty to file consolidated returns and was free to make its own decision whether to file or not to file on the basis of its own interests.** But the Court of Appeals held (Judge Fee dissenting) in response to repeated assertions of the defendant Railroad Company that it had not paid its pre-reorganization debts and that the plaintiff Western Pacific Railroad Corporation was under an equit-

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*Western Pacific Railroad Company Reorganization, 230 I.C.C. 61; 233 I.C.C. 409; in re Western Pacific Railroad Company, No. 26591-S, 34 F. Supp. 493; Western Pacific Railroad Company vs. Reconstruction Finance Corporation, et al., and four other cases, No. 9712, 124 Fed. 2d 136 (1941); Ecker and others vs. Western Pacific Railroad Corporation, et al., 318 U. S. 418 (1943); Western Pacific Railroad Corporation vs. Western Pacific Railway Company, et al., No. 26508, 85 F. Supp. 869 (1949); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 197 Fed. 2d 994 (1951); Western Pacific Railroad Corporation, et al., v. Western Pacific Railroad Company, et al., 345 U. S. 247 (1953); and after remand 205 Fed. 2d 374, 206 Fed. 2d 495.

**Treasury Regulation 109, Sec. 23—16a and 11a —Duke Power Company v. Commission, 44 Fed. 2d 543, 545 (4 Circuit).

able duty as fiduciary to join in consolidated returns and thereby donate its tax credit and the avails thereof to the reorganized defendant Railroad Company because its creditors had not been fully paid. The following is from the prevailing opinion written by Judge Byrne:

"The Corporation was the sole owner of the subsidiary's (the debtor's) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the interests of the creditors and holders of other securities. Consolidated Rock Products Co. v. Du Bois (312 U. S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its co-operation then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

The plaintiffs are bound by and accept this determination of the Court of Appeals, and their purpose and objective in filing this successoral complaint is to provide the essential machinery or medium for implementing it and requiring the reorganized Western Pacific Railroad Company, as in duty bound under its Assumption Agreement as the trustee-custodian of the fund also to accept it and to carry it into effect.

Seventh: The doctrine of Consolidated Rock Products Company vs. Du Bois (312 U. S. 510) is that junior interests in a bankruptcy or equity administration proceeding cannot be given any part

or securities representing any part of the debtor's estate unless and until full compensatory treatment is given for the entire bundle of rights which the senior creditors surrender. In the proceeding 26591-S, the Plan of Reorganization approved by this Court and by the Supreme Court of the United States allotted to the senior creditors, in full satisfaction of their claims, securities representing in the determination of the Interstate Commerce Commission and of the Court the full value of their claims without resorting to an excess value of the senior liens which they surrendered; and thereupon gave a residue valued at $5,964,296 to creditors secured by liens wholly subordinate to the liens held by the senior creditors. It is accordingly res adjudicata in the proceeding 26591-S that any fiduciary duty of the plaintiffs Western Pacific Railroad Corporation to donate its special tax credit, or taxes remitted there against, under Section 23(g)(2)(4) is one to be exercised for the exclusive benefit of the creditors of the debtor Western Pacific Railroad Company left unprovided for or inadequately provided for under the Plan of Reorganization approved by the Supreme Court of the United States in Ecker vs. Western Pacific Railroad Corporation, 318 U. S. 448.

Eighth: In the exercise of its jurisdiction in the proceedings 26591-S, the Interstate Commerce Commission determined the amount of the indebtedness of the debtor as of January 1, 1939, for which full compensatory treatment was not accorded under the

Plan of Reorganization to be $13,914,530, of which $6,249,750 was due and owing to the A. C. James Company; $7,609,370 was due and owing to the plaintiff Western Pacific Railroad Corporation, and $60,410 was due and owing to Western Realty Company. The claim of the A. C. James Company was liquidated in part out of collateral pledged by the debtor (junior lien bonds of the debtor or new securities issued thereagainst and substituted therefor) and the unliquidated balance as shown by an exhibit introduced by the defendant Railroad Company in said action "No. 26508 Civil" is $3,495,000 but is subject to adjustment bringing it up to $3,683,175.* In addition to the creditor claims so determined and allowed by the Interstate Commerce Commission the claim of plaintiff Western Pacific Railroad Corporation as owner of all of the debtor's preferred stock was allowed in the amount in excess of $40,000,000.**

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*In the exhibit introduced by the defendant Railroad Company to establish the deficiency of the A. C. James Company, it was charged with 37,635 shares of new common stock at $62 instead of its true currency value of $57 as fixed by the treatment accorded the senior lien creditors—exhibit (defendant's) No. 33, record page 2022.

**A secured claim of Railroad Credit Corporation was fully liquidated by the use of common stock pledged at $62 per share and certain Accommodation Collateral supplied by Western Pacific Railroad Corporation, the unused balance of which Accommodation Collateral was restored to Western Pacific Railroad Corporation under a decree of the Chancery Court of the State of Maryland.

Ninth: As hereinbefore alleged the plaintiffs are filing this complaint as an independent or successoral action in equity to provide an essential machinery or medium for implementing the decree or judgment in said action "No. 26508 Civil" and for an administration of the trust arising thereunder or in consequence thereof and as a civil action in equity between citizens of different states, viz., the plaintiffs Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, both being citizens and residents of the State of Delaware and Western Pacific Railroad Company, a corporation, organized and existing under the laws of the State of California, as a defendant, wherein the amount in controversy greatly exceeds $5,000.00.

Tenth: James Foundation of New York, Inc., successor to the creditor position of A. C. James Company, is a corporation of the State of New York; and Western Realty Company is a corporation of the State of Colorado, and each being an unsatisfied creditor of the debtor, and as such a beneficiary of the trust created as hereinbefore alleged, is an interested but not an indispensible party to this proceeding, and being such both also have been named as parties defendant herein.

Eleventh: The reason why this complaint was not filed at a earlier date is that the status of the $17,201,739 fund in the custody of the reorganized Western Pacific Railroad Company, defendant herein, was not finally established until the denial of the second petition for certiorari at the present

term of the United States Supreme Court in said action in this Court entitled, "Western Pacific Railroad Corporation, et al., vs. Western Pacific Rr. Co., et al., No. 26508-Civil."

Twelfth: While said second petition for certiorari was pending in the United States Supreme Court on application for rehearing, the plaintiff receiver wrote the President of the defendant Railroad Company as follows:

"If the Supreme Court denies our pending petition for a rehearing of the application for certiorari and establishes the position taken by your counsel throughout the litigation that the $17,000,000 fund in your custody is a trust fund for the satisfaction of the unpaid creditors of your company (pre-reorganization) it is our purpose to apply to the Bankruptcy Court for a proper application of the fund to that purpose. I am writing this in advance to put you and your directors on notice of our position."

No reply to or acknowledgment of said communication has been received by the plaintiffs but they are informed and allege that the defendant Railroad Company proposes to divert the fund to purposes other than the payment and satisfaction of claims of partially paid and wholly unpaid (pre-reorganization) creditors of the defendant Railroad Company and to utilize it for the enrichment of the creditors, and successors in interest of creditors that received full compensatory treatment under the Plan of Reorganization.

Wherefore, the plaintiffs pray:

(1) That this Court make cognizance of this cause and grant unto them a writ of subpoena of the United States directed to Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, named as defendants herein, service upon the two defendants last named to be made by the Marshal of the District wherein personal service may be effected;

(2) That this Court grant unto the plaintiff a judgment or decretal order adjudging that the fund of $17,201,739 in the possession of the reorganized Western Pacific Railroad Company is held by it subject to the Assumption Agreement executed by it pursuant to the order and decree of this Court in the proceeding 26591-S, and is held by it in trust for the benefit of the unpaid and unsatisfied creditors of the debtor in said proceeding 26591-S in order of their respective priorities and for the interests junior thereto as heretofore determined by the Interstate Commerce Commission;

(3) That this Court enter a preliminary order placing said fund of $17,201,739 in judicial custody and requiring and directing the defendant Western Pacific Railroad Company to hold said fund subject to the further order or orders of this Court which may include an order or orders providing therefrom currently for the expenses of the plaintiffs and their attorney and counsel in resisting the threatened conversion thereof; and

(4) That the plaintiffs may have such further relief by way of declaratory judgment or decree of injunction, temporary or permanent, or both, or otherwise as to the Court may seem meet.

Dated: May 4, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DU PONT BAYARD, RECEIVER,

Plaintiffs;

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,

/s/ WILLIAM MARVEL,
Counsel.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To plaintiffs and to their attorney, Leroy R. Goodrich, Esquire:

You will please take notice that on Monday, May 31, 1954, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the above-entitled Court, in the Post Office Building, Seventh and Mission Streets, San Francisco, defend-

ant The Western Pacific Railroad Company will bring on the aforesaid motion for hearing before the above-entitled Court.

Dated May 17, 1954.

/s/ ALLAN P. MATTHEW,
/s/ JAMES D. ADAMS,
/s/ BURNHAM ENERSEN,
/s/ ROBERT L. LIPMAN,

Attorneys for Defendant, The Western Pacific Railroad Company.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,
Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

MOTION OF DEFENDANT, THE WESTERN PACIFIC RAILROAD COMPANY, FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS

Defendant, The Western Pacific Railroad Company, moves the Court for Summary judgment against plaintiffs, pursuant to Rule 56, Federal Rules of Civil Procedure.

This motion is based upon the complaint and amended complaint herein, and on the orders, judgments and decrees, and the pleadings, papers, and

all other files and records in the above-entitled Court, and the reported decisions of the United States Supreme Court and of the United States Court of Appeals for the Ninth Circuit, in the following-described suit in equity and proceeding in bankruptcy:

1. The suit in equity, case No. 26,508 Civil, in the files of this Court, entitled "The Western Pacific Railroad Corporation, et al., plaintiffs, vs. The Western Pacific Railroad Company, et al., defendants," which suit is hereinafter referred to as the "Tax Saving Case."

2. The proceeding in Bankruptcy, No. 26,591-S in the files of this Court, entitled "In the Matter of The Western Pacific Railroad Company, Debtor," which proceeding is hereinafter referred to as the "Reorganization Proceeding."

The Court has judicial knowledge of all said decisions, orders, judgments, decrees, records and files and the contents thereof.

This motion is made upon the following grounds:

(a) There is no genuine issue as to any material fact and this defendant is entitled to a judgment against plaintiffs as a matter of law.

(b) The complaint fails to state a claim upon which relief can be granted to plaintiffs or either of them.

(c) The issues sought to be litigated in this action have been determined against plaintiffs by:

(1) the judgment of this Court entered on January 13, 1950, in the Tax Saving Case;

(2) the orders of the United States District

Court for the Northern District of California, Southern Division, in the Reorganization Proceeding, which proceeding was terminated by final order entered on March 28, 1946.

The said judgment and orders have, and each thereof has, become final in all respects, and constitute complete and final determinations of and res judicata as to all issues between plaintiffs and this defendant herein.

(d) Plaintiffs base their claims upon facts and transactions which were the basis of their claims in the Tax Saving Case. All said facts and transactions were proved and are of record in the Tax Saving Case. In the Tax Saving Case plaintiffs invoked the full powers of the Court as a court of equity to grant relief to them on account of said facts and transactions. By the judgment of the Court therein, filed January 13, 1950, and affirmed by the United States Court of Appeals for the Ninth Circuit, as appears from its mandate of December 14, 1953, plaintiffs were denied all relief. The judgment provided as follows:

"It is by the Court Ordered, Adjudged and Decreed that the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, be denied all relief, and that the interveners be denied all relief, and that plaintiffs recover nothing and the interveners recover nothing from the defendants or any of them."

This judgment is res judicata as to all issues and questions herein between plaintiffs and this defendant.

(e) Plaintiff, The Western Pacific Railroad Corporation, presented its claim as unsecured creditor of the debtor in the Reorganization Proceeding. Said claim was determined to be without equity or value, and was expressly cancelled and discharged, in the Reorganization Proceeding, and its assertion by litigation was enjoined by the Final Order in said proceeding.

(f) In the Reorganization Proceeding, it was finally determined, after running the full gamut of court and administrative procedure, that plaintiff's claim was worthless. The reorganization was consummated in December of 1944 and the Reorganization Proceeding was finally terminated in 1946, and all orders and judgments therein have long since become final. For the Court to make any award to plaintiffs herein, or to grant any relief to them, would in effect modify the administrative and judicial judgments in the Reorganization Proceeding, contrary to the purpose and effect of Section 77 of the Bankruptcy Act.

(g) The orders and judgments in the Reorganization Proceeding are res judicata against plaintiffs as to all issues and questions herein between plaintiffs and this defendant.

(h) The claims of the plaintiffs herein are discharged, foreclosed and barred under and by virtue of Section 77 (f) of the Bankruptcy Act.

(i) It is not true that in and by the findings of this Court or the rulings of the United States Court of Appeals for the Ninth Circuit in the Tax Saving Case any fund was held or determined to exist in

the possession of this defendant, or at all, subject to any claim of plaintiffs or either of them, or to any other claim, on account of the tax savings which were the subject of the Tax Saving Case and are the subject of the complaint herein, or on any account. On the contrary, plaintiffs applied to the Court in the Tax Saving Case to have the tax savings deposited as a fund in court, and to have them dealt with as a fund, and for participation therein, but their application was not granted, and in and by the orders and proceedings taken and had by the Court in the Tax Saving Case, and the judgment therein, plaintiffs were denied all relief. Said orders, proceedings and judgments are res judicata against plaintiffs as to all issues and questions respecting the purported fund mentioned in their complaint herein.

(j) No indebtedness, obligation or liability to the plaintiffs or either of them of any kind, character or description was assumed by this defendant under or by virtue of the Assumption Agreement mentioned in the complaint herein, or in relation to the tax savings which are the subject of the said complaint, or at all. In the Tax Saving Case plaintiffs asserted claims thereunder and the judgment in the Tax Saving Case is res judicata against plaintiffs as to all issues and questions herein respecting the Assumption Agreement and the obligations thereunder.

(k) The plaintiffs' claims are barred by the statutes of limitations applicable thereto, to wit, Subdivisions 1 and 2 of Section 337, Subdivision 1

of Section 339 and Section 343 of the Code of Civil Procedure of the State of California.

Wherefore, this defendant prays for a summary judgment against plaintiffs herein and for its costs.

Dated May 17, 1954.

/s/ ALLAN P. MATTHEW,
/s/ JAMES D. ADAMS,
/s/ BURNHAM ENERSEN,
/s/ ROBERT L. LIPMAN,
Attorneys for Defendant, The Western Pacific Railroad Company.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,
Of Counsel.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

DRAFT OF SUMMARY JUDGMENT PROPOSED BY DEFENDANT, THE WESTERN PACIFIC RAILROAD COMPANY, FILED PURSUANT TO RULE 3(b) OF THE RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Summary Judgment

The motion of defendant, The Western Pacific Railroad Company, for summary judgment pur-

suant to Rule 56 of the Federal Rules of Civil Procedure having come on for hearing before the Court ....., 1954, upon the said motion and the complaint and amended complaint herein, and the plaintiffs having appeared in opposition to said motion by Leroy R. Goodrich, Esq., their attorney, and the moving party having appeared by its attorney, Allan P. Matthew, Esq., and the motion having been heard and considered by the Court, and submitted to the Court for decision, and it appearing to the Court that said defendant is entitled to summary judgment as prayed in its motion;

Now, Therefore, it is hereby ordered, adjudged and decreed that defendant, The Western Pacific Railroad Company, do have and recover judgment against plaintiffs and each of them, upon each and all the grounds stated in its motion, each and every one of which said grounds is hereby found and determined to be a valid ground for this judgment; that the plaintiffs be and they are hereby denied all relief against said defendant; and that said defendant do have and recover from plaintiffs its costs herein, taxed in the amount of $.....

Done in Open Court this .... day of ....., 1954.

....., Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANT, THE WESTERN PACIFIC RAILROAD COMPANY, FOR SUMMARY JUDGMENT

1. The Court may take judicial notice of the records and proceedings in the Tax Saving Case and in the Reorganization Proceeding.

U. S. v. Pink,
315 U. S. 203 (1942);

Latta v. Western Investment Co.,
173 F. 2d 99 (C.A. 9th, 1949), cert. den.,
337 U. S. 940;

Kelly v. Johnston,
111 F. 2d 613 (C.A. 9th, 1940), cert. den.,
312 U. S. 691.

2. The Tax Saving Case is res judicata as to all questions and issues herein between plaintiffs and defendant, The Western Pacific Railroad Company.

Cromwell v. County of Sac.,
94 U. S. 351 (1877);

Northern Pacific Railroad Co. v. Slaght,
205 U. S. 122 (1907);

Hatchitt v. United States,
158 F. 2d 754 (C.A. 9th, 1946);

Williamson v. Columbia Gas & Electric Corporation, 186 F. 2d 464 (C.A. 3rd, 1950), cert. den., 341 U. S. 921;

Wilson Cypress Co. v. Atlantic Coast Line R. Co., 109 F. 2d 623 (C.A. 5th, 1940), cert. den., 310 U. S. 653;

Miller v. National City Bank of New York,
166 F. 2d 723 (C.A. 2d, 1948);

Panos v. Great Western Packing Co.,
21 Cal. 2d 636 (1943);

Krier v. Krier,
28 Cal. 2d 841 (1946);

Woolverton v. Baker,
98 Cal. 628 (1893);

Restatement of the Law of Judgments,
§§61 and 63.

3. Plaintiffs' claim as unsecured creditor was cancelled and discharged in the Reorganization Proceeding.

In the Plan of Reorganization the claim was declared to be worthless and without equity or value. In the Revestment Order of November 27, 1944, it was "cancelled and discharged," the order providing that the reorganized company "shall assume only the valid and outstanding obligations of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged." The same order vested the estate and property in the reorganized company free and clear of all rights, claims, liens and interests of "the former stockholders and creditors of the debtor" and further provided that the reorganized company shall be "forever released and discharged from all of its debts, obligations and liabilities except as herein

provided." By the final order of March 28, 1946, all persons were perpetually restrained and enjoined from instituting or prosecuting any suit against the reorganized company "on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, * * * may have had in, to or against the debtor, or any of its assets or properties on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), * * *."

4. The Reorganization Proceeding cannot now be reopened.

Western Pacific R. Corp. v. Western Pacific R. Co., 85 F. Supp. 868 (N.D. Cal., 1949);

Insurance Group Committee v. Denver & Rio Grande Western R. Co., 329 U. S. 607 (1947).

The Erie Reorganization Cases:

Duryee v. Erie R. Co.,
175 F. 2d 58 (C.A. 6th, 1949) (cert. den., 338 U. S. 861), 91 F. Supp. 1009 (N.D. Ohio, 1950) (aff'd per curiam, 191 F. 2d 855, cert. den., 342 U. S. 948);

Beckley v. Erie R. Co.,
175 F. 2d 64, 76 F. Supp. 635;

Massie v. Erie R. Co.,
196 F. 2d 130 (C.A. 3rd, 1952);

In re Chicago, Rock Island & Pacific Ry. Co.,
168 F. 2d 587 (C.A. 7th, 1948), cert. den., 335 U. S. 855;

In re St. Louis-San Francisco Ry. Co., 68 F. Supp. 921 (E.D. Mo., 1946), (appeal dismissed on motion of appellees, 160 F. 2d 109).

See also Public Law 478, 80th Congress, effective April 9, 1948, 11 U.S.C.A., §208, providing that reorganization plans under §77 cannot be modified after consummation.

5. The Reorganization Proceeding is res judicata as to plaintiffs' claims.

New York v. Irving Trust Co., 288 U. S. 329 (1933);

Stoll v. Gottlieb, 305 U. S. 165 (1938);

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940).

6. The claim is barred by Section 77(f).

Section 77(f) provides that the plan and the order confirming it shall, subject to the right of judicial review, "be binding upon all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." It also provides that the property dealt with by the plan "shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan

be reserved" in the order confirming the plan or in the order directing revestment in the reorganized company. Section 77(f) also provides for the final decree upon termination of the proceedings.

7. There is no such "fund" as plaintiffs allege.

Plaintiffs assert that as a result of the findings in the Tax Saving Case the defendant is in possession of a "fund" of tax savings held by it for the benefit of the unpaid creditors of the debtor in reorganization. This is in error. The fact is, that in the Tax Saving Case the plaintiffs applied to the Court to have the tax savings treated as a fund held by defendant for plaintiffs' benefit (Complaint, Par. VII; Prayer of the Complaint, Pars. 1, 5; Supplemental Complaint, Par. Twelfth, subparagraph 4; Prayer of the Supplemental Complaint) but their application was not granted and they were denied all relief by the judgment in that case.

8. The judgment of the District Court, affirmed by the Court of Appeals, in the Tax Saving Case, was "that plaintiffs recover nothing," and no "machinery or medium" is now available to plaintiffs, either by asserted "successoral complaint" or otherwise, to change that final judgment into a judgment for plaintiffs.

9. The Assumption Agreement does not help plaintiffs.

(1) The Assumption Agreement was prescribed in the reorganization by the Revestment Order of November 27, 1944. That order expressly provides that "unsecured claims not entitled to priority over

existing mortgages" are not to be assumed and that they "are hereby cancelled and discharged."

(2) Plaintiffs relied upon the Assumption Agreement in the Tax Saving Case (see, e.g. Supplemental Complaint, paragraph Eleventh) but were denied all relief by the judgment in that case.

10. Plaintiffs' claims are barred by limitation. The applicable statutory period is two years (C.C.P. 339). In any event the four year periods under C.C.P. 337 and 343 have run. Twenty years have run since the plaintiff's claim as unsecured creditor arose; ten years have run since a tax reserve was ordered in the Reorganization Proceeding; eight years have run since the final order terminating the Reorganization Proceeding; and nearly seven years have run since the settlement of the tax matter with the Government.

Respectfully submitted,

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ BURNHAM ENERSEN,

/s/ ROBERT L. LIPMAN,

Attorneys for Defendant, The Western Pacific Railroad Company.

Dated May 17, 1954.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE,

Of Counsel.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between plaintiffs and defendant, The Western Pacific Railroad Company, that the motion of said defendant for summary judgment herein may be set down for hearing June 11, 1954, at ten o'clock a.m., or as soon thereafter as counsel may be heard, before the Honorable Louis E. Goodman, Judge of the above-entitled court, such hearing being contemporaneous with the return day of the order to show cause issued May 13, 1954, and returnable at ten o'clock a.m. on June 11, 1954, before Judge Goodman, in the Matter of the Reorganization of The Western Pacific Railroad Company, No. 26591-S in Bankruptcy.

The parties above named respectfully request the Court to make its order in accordance with this stipulation.

Dated: May 25, 1954.

/s/ LEROY R. GOODRICH,
Attorney for Plaintiffs.

/s/ ALLAN P. MATTHEW,

/s/ JAMES D. ADAMS,

/s/ BURNHAM ENERSEN,

/s/ ROBERT L. LIPMAN,
Attorneys for Defendant, The Western Pacific Railroad Company.

It Is So Ordered.

Dated: May 25, 1954.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed May 26, 1954.

[Title of District Court and Cause.]

MOTION OF THE WESTERN PACIFIC RAILROAD CORPORATION AND ALEXIS I. DuPONT BAYARD, RECEIVER, PLAINTIFFS HEREIN, FOR A SUMMARY JUDGMENT AGAINST THE DEFENDANT, THE WESTERN PACIFIC RAILROAD COMPANY, PURSUANT TO RULE 56, FEDERAL RULES OF CIVIL PROCEDURE

Now come the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, and move this court for a summary judgment against the defendant, The Western Pacific Railroad Company, pursuant to Rule 56, Federal Rules of Civil Procedure, on the following grounds:

(1) All essential allegations of the amended bill of complaint are within the judicial knowledge of this Court and are admitted to be true by the defendant Western Pacific Railroad Company in its pending motion for summary judgment against the plaintiffs.

(2) In Civil Action No. 26508, it was determined that the defendant Western Pacific Railroad Com-

pany was not accountable to the plaintiffs under the assumption agreement executed by it under the requirements of the final orders and decrees in the Bankruptcy cause No. 26591-S in respect of the use by the Trustees of a tax credit belonging exclusively to Western Pacific Railroad Corporation to discharge a tax liability of the Trustees in the amount of $17,201,739.00 because of (a) the fiduciary relationship then existing between Western Pacific Railroad Corporation and its wholly owned subsidiary Western Pacific Railroad Company in process of reorganization in the Bankruptcy Court, and (b) the obligation of the Western Pacific Railroad Corporation deemed to arise therefrom or to be consequent thereon to utilize its tax credit to satisfy the lawful claims of partially paid or wholly unpaid pre-reorganization creditors of its subsidiary.

(3) In the pending Civil Action No. 33514, brought by the same parties plaintiff as those in Civil Action No. 26508, to implement and make effective the determination in that action, a judgment or decree is asked adjudging that the $17,201,-739.00 fund in the custody of the defendant Western Pacific Railroad Company resulting from the expropriation of the tax credit belonging to the Western Pacific Railroad Corporation is a trust fund to be administered by the District Court for the unsatisfied pre-reorganization creditors, all of which are parties either plaintiff or defendant in said pending Civil Action No. 33514.

(4) Recognizing, as we submit, that there is no meritorious defense to Civil Action No. 33514, the

defendant Western Pacific Railroad Company is attempting to defeat it by securing a contempt order in the Bankruptcy cause No. 26591-S and to use such order to obstruct an appeal to the Court of Appeals whose determination it was that created the resulting trust. The plaintiffs herein have filed a return in the contempt proceeding, of which a copy is hereto attached and made a part hereof.

Wherefore, plaintiffs pray for a summary judgment against defendants herein and for their costs.

Dated: May 28, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,
Plaintiffs,

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR,
/s/ WILLIAM MARVEL,
Counsel.

[Title of District Court and Cause.]

THE RESPONDENTS' RETURN TO THE ORDER TO SHOW CAUSE WHY THEY SHOULD NOT BE ADJUDGED GUILTY OF AND PUNISHED FOR CONTEMPT OF THIS COURT

Now come the respondents, plaintiff in Civil Action No. 33514, and as their Return to the Order to Show

Cause why they should not be adjudged guilty of and punished for contempt of this Court for violation of the final Order of this Court, dated March 28, 1946, respectfully show:

First: The successoral action commenced by the respondents in this Court, being Civil Action No. 33514, was brought against the defendant Western Pacific Railroad Company under the Assumption Agreement executed by the defendant Western Pacific Railroad Company as required by said final Order to enforce a valid and subsisting liability of the reorganization Trustees which was transferred to the reorganized Western Pacific Railroad Company; and it is an excepted action provided for and contemplated by said final decree of March 28, 1948, and in no respects violative thereof.

Second: Said successoral action was brought by respondents to implement a determination of the Court of Appeals in the Ninth Circuit in an earlier and substantially identical action brought by them under said Assumption Agreement, by providing a machinery or medium for the administration of a trust resulting therefrom in respect of a fund of $17,201,739.00 in the custody of the defendant Railroad Company but held by it subject to all of its obligations under said Assumption Agreement.

Third: Said successoral action was brought by the respondents under authority and at the direction of the Chancery Court of the State of Delaware, County of New Castle, as appears from the Affidavit of William Marvel, Attorney for the Receiver, filed herewith as part of this Return.

And having thus fully answered, and with profound respect, made their return to the Order, and adequate cause being shown, the respondents respectfully pray that the Order to Show Cause be dissolved.

Dated: May 28, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs,

By LEROY R. GOODRICH,
Their Attorney.

FRANK C. NICODEMUS, JR,
WILLIAM MARVEL,
Counsel.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM MARVEL, ATTORNEY FOR ALEXIS I. DuPONT BAYARD, RECEIVER

State of Delaware,
New Castle County—ss.

Be It Remembered that on this 26th day of May, 1954, personally came before me, the subscriber, a Notary Public for the State and County aforesaid, William Marvel, Attorney for Alexis I. duPont Bayard, Receiver, who being by me first duly sworn did depose and say:

That by order of April 19, 1950, he was appointed attorney of record for the said Receiver by the

Honorable Collins J. Seitz, Chancellor of the State of Delaware.

1. That Western Pacific Railroad Corporation is in process of liquidation in the Court of Chancery of the State of Delaware, in and for New Castle County, and Alexis I. DuPont Bayard is its Receiver; and that he is informed that it is one of the three unpaid pre-organization creditors of Western Pacific Railroad Company.

2. That the action in the District Court for the Northern District of California, Southern Division, designated as Civil Action No. 33514, was commenced under the general authority and direction of the Chancellor of the State of Delaware, by Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its Receiver, against the reorganized Western Pacific Railroad Company, as the principal defendant, and James Foundation of New York and Western Realty Company, the two remaining unsatisfied pre-organization creditors, as secondary defendants for the following reasons:

(a) That the final orders and decrees of the Bankruptcy Court in No. 26591-S required the defendant Western Pacific Railroad Company to execute an assumption agreement whereby it assumes all liabilities of the Trustees growing out of their operations as such Trustees in a period which included January 1, 1942-April 30, 1944, and excepted from the inhibitions in the final orders and decrees against further litigation any suit brought under the assumption agreement to enforce a liability of the Trustees growing out of such operation;

(b) That the stock-loss tax credit in the use of which by the Trustees a tax liability of the Trustees for said period amounting to $17,201,739 was relinquished by the Treasurer of the United States was the exclusive property of Western Pacific Railroad Corporation and was never an asset of the Western Pacific Railroad Company;

(c) That Western Pacific Railroad Corporation on October 10, 1946, in accordance with the authorization of the final orders and decrees in the Bankruptcy Court brought suit under the assumption agreement in the same District Court, being Civil Action No. 26508 against the reorganized Western Pacific Railroad Company, to require it to account to the plaintiff as the exclusive owner of said tax credit for the amount of taxes relinquished thereagainst by the Treasurer of the United States;

(d) That accountability to Western Pacific Railroad Corporation as owner of the tax credit was denied and its expropriation by the Trustees was finally sanctioned by the Court of Appeals, in the Ninth Circuit, for the reason, as determined by that Court, that Western Pacific Railroad Corporation, as owner of all preferred and common stock of the pre-reorganization Western Pacific Railroad Company, owed a fiduciary duty and obligation to utilize its credit for the benefit of the creditors of the pre-reorganization Railroad Company.

(3 That it was and is his opinion communicated

3. That it was and is his opinion communicated to Alexis I. DuPont Bayard, Receiver, that there is a justiciable question whether the defendant,

Western Pacific Railroad Company, under the assumption agreement as successor to the obligations of the Trustees is not as a consequence of the opinion of the United States Court of Appeals in the Ninth Circuit accountable to such creditors to the same extent that it would have been accountable to the Western Pacific Railroad Corporation if the superior equity of the unsatisfied creditors had not supervened.

4. That it was and is his opinion, also communicated to Alexis I. DuPont Bayard, Receiver, that the right of the Western Pacific Railroad Corporation and its said Receiver, as an unsatisfied creditor to require the Trustees to recognize their superior equity and to enforce that right under the assumption agreement against the defendant Western Pacific Railroad Company is in principle the same as the right asserted under the assumption agreement in Western Pacific Railroad Corporation, et al., vs. Western Pacific Railroad Company, et al., No. 26508, which was not questioned by the Court of Appeals or the United States Supreme Court as being affected by the injunctive provisions of the decree of the Bankruptcy Court entered on March 28, 1946.

WILLIAM MARVEL.

Sworn to and subscribed before me the day and year aforesaid. Witness my hand and seal of office.

[Seal] FLORENCE P. BAGLEY,
Notary Public.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service of the papers hereinafter described is acknowledged by the undersigned this 1st day of June, 1954.

1. Motion of Western Pacific Railroad Corporation for summary judgment.

2. Notice of Motion.

ALLAN P. MATTHEW,

JAMES D. ADAMS,

BURNHAM ENERSEN,

ROBERT L. LIPMAN,

By /s/ JAMES D. ADAMS.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendant Western Pacific Railroad Company and to Its Attorneys, Allan P. Matthew, James D. Adams, Burnham Enersen, Robert L. Lipman, and McCutchen, Thomas, Matthew, Griffiths & Greene:

You Will Please Take Notice that on Friday, June 11, 1954, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, before the Honorable,

Louis E. Goodman, Judge of the above-entitled Court, at the Post Office Building, Seventh and Mission Streets, San Francisco, the plaintiffs, the Western Pacific Railroad Corporation and Alexis I DuPont Bayard, Receiver, will bring on the aforesaid motion for summary judgment.

Dated May 28, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs,

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

MEMORANDUM TO THE COURT RE CONTEMPT

Plaintiffs' counsel are grateful for the privilege of filing this Memorandum, hoping as they do to convince the Court that their Bill of Complaint does not violate in any degree whatsoever the final injunctive order of the Bankruptcy Court.

When counsel and the Court are as far apart as

was evident at the close of the oral argument on June 11, 1954, the reason is unless counsel are irresponsible (which we believe we are not; being fully conscious of and sensitive to our obligations to the Court), that the Court and counsel are thinking at cross purposes; their minds are focusing on different but not necessarily irreconcilable concepts.

Contempt of Court is a very serious charge; one that ought not to be made recklessly. We submit that that charge has been made with sinister recklessness against the plaintiffs in this case.

This we shall not undertake to demonstrate, and for the opportunity so to do we again express our gratitude.

The injunction which the plaintiffs are said to have violated is in the final order of the Bankruptcy Court dated March 28, 1946, which very properly enjoins any suit against the reorganized defendant Western Pacific Railroad Company to enforce a pre-reorganization claim against it or against the property transferred to it under the revestment order, which also very properly includes the "earnings" of the property during trusteeship; and if the plaintiffs' Bill of Complaint can be construed as an attempt to tap the "earnings" of the property during trusteeship or to disturb the property itself, it clearly runs afoul of the injunctive order of the Bankruptcy Court.

But the plaintiffs' Bill of Complaint presents no such case; and we respectfully submit counsel seeking the contempt order know this just as well as we do.

The plaintiffs' case (this time it sues as a creditor of the late bankrupt and not as a stockholder), is against the defendant Western Pacific Railroad Company upon its Assumption Agreement to enforce an obligation of the trustees to account to the plaintiffs and other unsatisfied creditors of the late bankrupt for the value of the plaintiffs' tax credit so used, would have been paid to the Treasurer of the monies which, if the plaintiffs' tax credit were not used, would have been paid to the Treasurer of the United States. Funds transferred by the trustees under the revestment order are not "earnings" until all trustees' obligations are discharged and that is why the Assumption Agreement was exacted.

This Court in the prior case brought by the plaintiffs as sole stockholder of the late bankrupt held two things:

First: That Congress would have convicted itself of "plain stupidity" if its intention was to remit to a subsidiary taxes due from the subsidiary to offset a loss not sustained by the subsidiary; and

Second: That the District Court was bound to leave the money where it was because of the same final Order of the Bankruptcy Court as is now claimed to have been violated by the plaintiffs suing as an unpaid creditor instead of, as then, as the sole stockholder; i.e., the District Court sustained the defendant Western Pacific Railroad Company's plea of res adjudicata based on the same final order of the Bankruptcy Court that is now again invoked.

If that plea of res adjudicata had been sustained by the Court of Appeals there might be some excuse

for the present contempt proceedings; but it was not. Along with seven other defenses listed below it was rejected.*

Our concern here is with the plea of res adjudicata rejected in the prior case. But before taking it up in detail, there is one factor bearing on the ethics of the contempt proceeding which we wish to mention. The factor is that not one single appellate judge has yet seen fit to differ with the District Court's view that Congress did not intend the remitted tax monies to remain with the subsidiary the worthless of whose stock created the tax credit.

Judge Fee thought that all of the remitted taxes should go to the parent. In his dissenting opinion he said:

> "If the plaintiffs were still the owner of the stock of the defendant then the allocation of $17,000,000 to defendant would be reflected in the increased value of its stock. The transfer of the stock left the right untouched. Since increase in the value of stock in defendant no longer is of avail to the plaintiffs there should be another method of applying the remission to loss."

Mr. Justice Jackson in his opinion (dissenting on a procedural point), said:

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*The defenses rejected by the Court of Appeals are unctuously summarized by their authors as follows: Discharged in bankruptcy pursuant to Section 77 of the Bankruptcy Act, res adjudicata, Estoppel, laches, failure of consideration, illegality, Statute of Limitations and Waiver. (Rec. 250.)

> "Indeed it is probable that the intention of the Statute permitting the consolidation of the two positions was to provide salvage for the loser, not profit for one which sustained no loss."

The majority opinion of the Court of Appeals written by District Judge Byrne in which Circuit Judge Healy concurred, does not condone the retention of the remitted tax monies by the defendant Railroad Company which sustained no loss. If the opinion means anything at all it can only mean that the remitted tax monies are a trust fund for the benefit of unpaid creditors. All that the majority opinion does, is affirm the judgment dismissing the plaintiffs' claim, not as held by the District Court on the plea of res adjudicata, but on the ground which we think quite defensible; i.e., that unsatisfied creditors had a prior right to the remitted taxes before the parent could be allowed to participate. This was not mere dictum. It was necessary to determine the rights of creditors in order to affirm dismissal of the suit of the stockholder plaintiff. All of the unsatisfied creditors are before the Court in the successoral action which is so framed that the District Court can administer the fund and determine the equities of all parties having or asserting a right therein.

The majority opinion written by Judge Byrne does not discuss the plea of res adjudicata but it must have been rejected. If it had been deemed a valid plea its acceptance would have ended the case. The Court, however, went forward on the merits.

Judge Fee in his dissenting opinion does, however, develop the reasons why this plea was properly rejected. In footnote 6, Judge Fee says:

> "The error of the lower Court was in assuming that the plaintiff is seeking an interest in the defendant corporation instead of property taken by the defendant which belonged to the plaintiff."

Counsel for the present plaintiffs, asserting their right as an unsatisfied creditor, framed the successoral Bill of Complaint in the light of and in reliance upon the binding decision of the Court of Appeals, that the former action was not barred by the final order of the Bankruptcy Court.

We respectfully invite the attention of the Court to the following paragraph from the affidavit of William Marvel, Esq., counsel for receiver Bayard, which was misread to the Court in oral argument:

> "that the right of the Western Pacific Railroad Corporation and its Receiver as an unsatisfied creditor to require the trustees to recognize their superior equity, and to enforce that right under the Assumption Agreement against the defendant Western Pacific Railroad Company, is (in principle)* the same as the right asserted under the Assumption Agreement in Western Pacific Railroad Corporation, et al., vs. Western

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*We trust that defendant counsel's omission of the words "in principle" in reading this paragraph to the Court was merely an unfortunate mechanical mistake.

> Pacific Railroad Company, et al., No. 26508, which was not questioned by the Court of Appeals or the United States Supreme Court as being affected by the injunctive provisions of the decree of the Bankruptcy Court entered on March 28, 1946."

We are confident that this Court, if it had been practicable at the oral argument to furnish the significant background of the plaintiffs' Bill of Complaint and its deep rooted sanction in the decision of the Court of Appeals would not have expressed any tentative opinion in the contempt proceeding, unless it had been an opinion that the contempt proceeding was an imposition upon the Court. There is not only no basis for this proceeding; it is frivolous and, we add regretfully, it is sinister.

It is frivolous because the Bill of Complaint is fully sanactioned by the decision of the Court of Appeals in No. 26508, and it is sinister because its illy veiled design is to obstruct an appeal to the Court of Appeals from any decision favorable to the defendant Railroad Company upon the pending motion for Summary Judgment.

The Judiciary Act provides for an appeal from a Summary Judgment and one would be taken promptly by the defendant Railroad Company from any decision adverse to it. But it does not want the equal protection of the laws extended to its adversary. Such an appeal would not only put in grave jeopardy its possession of $17,201,739; it would put their counsel in the awkward position of

repudiating the cause of the unpaid creditors for whom they shed crocodile tears when they argued No. 26508 in that same Court.

At the oral argument opposing counsel read from an Order of the Bankruptcy Court which (as they read it), purports to cancel the plaintiffs' claim allowed in the Section 77 proceeding in the amount of $7,609,370. All that this can mean is that the claim cannot be made the basis of a suit against the reorganized defendant Western Pacific Railroad Company or its property. To this we raise no question. But if counsel are asserting that the Bankruptcy Court attempted to extinguish the claim (to "inter" it, we think the counsel said), the order is beyond the jurisdiction of the Bankruptcy Court and to that extent is a palpable nullity. The claim subsists as a debt due the plaintiffs which they can satisfy out of any accommodation collateral or other available assets not transferred to the defendant Western Pacific Railroad Company and any monies which the trustees were liable to set apart for the beneficial owners of the tax credit which was used to discharge the war time tax liability of the trustees.

The plaintiffs' pending action is brought to enforce rights established in No. 26508 as to which the Court was powerless to give relief because of the framework of the Bill of Complaint and absence of the parties primarily interested.

The plaintiffs now sue in a creditor capacity, and the other creditor interests have been named as defendants, and the Court is equipped and hence em-

powered very expeditiously to write the final chapter of an amazing litigation.

Even if this Court should find on some theory (we can conceive of none), that there has been a technical violation of the injunction, there is no question of mala fides; at most there is an excusable mistake of law (excusable because the same mistake of law was made by Judge Fee and if not actually at least inferentially by Judges Byrne and Healy); and under these circumstances, coupled with the possibility that the Court's own conception may be a faulty one, it is respectfully suggested and urged that the order signed by the Court should facilitate and not make prohibitively difficult appeals on all matters under submission.

Let there be no misunderstanding, however, as to what the precise question before the Court in the contempt proceeding actually is. The sole question is whether Civil Action No. 33514 (the pending proceeding), is barred by the final order in No. 25591-S (the bankruptcy proceeding) and, if so, why Civil Action No. 26508 (the mis-called tax saving suit), was not also barred. The answer is obvious—neither is barred.

There was a further question adroitly confused with it on the oral argument by counsel supporting the contempt proceeding; i.e., whether Civil Action No. 33514 is barred by No. 26508. We think it is not and that the Court of Appeals will so hold. Here, however, there is no injunction and in the absence of a sweeping contempt order nothing to prevent either party from exercising its normal right to

appeal. This is the raison d'etre of the contempt proceeding and "is not cricket."

The plaintiffs submit that they have shown abundant cause why they are not in contempt and respectfully pray that the order to show cause be dissolved.

Dated: June 21, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs,

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR,
/s/ WILLIAM MARVEL,
Counsel.

Affidavit of Service by Mail attached.
[Endorsed]: Filed June 28, 1954.

[Title of District Court and Cause.]

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs sue upon the claim of plaintiff Western Pacific Railroad Corporation, as an antecedent creditor of defendant, Western Pacific Railroad Company, a corporation. The claim sued upon was adjudicated and determined in the proceeding reorganizing defendant railroad company.[1]

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[1]233 I.C.C. 409; Ecker v. Western Pac. Railroad Company, 318 U.S. 448, 508, 509.

Therefore, defendant the Western Pacific Railroad Company's motion for summary judgment in its favor is granted.

The motion of plaintiffs for summary judgment in their favor is denied.

Dated: June 28, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed June 28, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

Civil Action No. 33514

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,

Plaintiffs,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Defendants.

SUMMARY JUDGMENT

The motion of defendant The Western Pacific Railroad Company for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure having come on for hearing before the Court June 11, 1954, upon the said motion and the complaint

and amended complaint herein, and the plaintiffs having appeared in opposition to said motion by Leroy R. Goodrich, Esq., their attorney, and the moving party having appeared by its attorney, Allan P. Matthew, Esq., and the motion having been heard and considered by the Court, and submitted to the Court for decision, and it appearing to the Court that said defendant is entitled to summary judgment as prayed in its motion;

Now, Therefore, it is hereby ordered, adjudged and decreed that defendant The Western Pacific Railroad Company do have and recover judgment against plaintiffs and each of them; that the plaintiffs be and they are hereby denied all relief against said defendant; and that said defendant do have and recover from plaintiffs its costs herein, taxed in the amount of $.....

Done in open court this 28th day of July, 1954.

/s/ LOUIS E. GOODMAN,
Judge.

Approved as to form, as provided in Rule 5(d), Rules of the United States District Court for the Northern District of California.

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,
Plaintiffs.

By /s/ LEROY R. GOODRICH,
Their Attorney.

[Endorsed]: Filed July 28, 1954.
Entered July 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order made and filed on June 28, 1954, by the Honorable Louis E. Goodman, United State District Judge, by which order (1) the motion of plaintiffs for summary judgment in their favor was denied and (2) the motion of the defendant, the Western Pacific Railroad Company, for summary judgment in its favor was granted.

Dated: July 26, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs.

By /s/ LEROY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL FOR COSTS

Know All Men by These Presents:

That Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, as Principals, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to transact its business of suretyship in the State of California, as Surety, are held and firmly bound unto the above named Defendants, Western Pacific Railroad Company, et al., in the full and just sum of Two Hundred Fifty and 00/100 ($250.00) Dollars, lawful money of the United States of America, to be paid to the said Defendants, their successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of July, 1954.

The Condition of the Above Obligation is such, That

Whereas on the 28th day of June, 1954, in the above-entitled action between the above-named Plaintiffs and the above-named Defendants, an Order was entered granting the motion of the Defendant, Western Pacific Railroad Company, for summary judgment in its favor and denying a motion of the Plaintiffs for summary judgment in their favor;

and said Plaintiffs have appealed to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, if the said Plaintiffs above named shall pay the costs if said appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the Order is modified, then the above obligation to be void; otherwise to remain in full force and effect.

/s/ LEROY R. GOODRICH,
Attorney for Plaintiffs.

[Seal] UNITED STATES FIDELITY & GUARANTY COMPANY,

By /s/ MILDRED DROST,
Attorney-In-Fact.

State of California,
County of Alameda—ss.

On July 27, 1954, before me, Boyd A. Gibson a Notary Public in and for the County of Alameda personally appeared Mildred Drost known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and his own name as Attorney-in-fact.

/s/ BOYD A. GIBSON,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM SUMMARY JUDGMENT

Notice Is Hereby Given that Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, Receiver, plaintiffs, hereby appeal to the United States District Court of Appeals for the Ninth Circuit from the summary judgment made on July 28, 1954, by the Honorable Louis E. Goodman, United States District Judge, in favor of the Western Pacific Railroad Company and against the plaintiffs and each of them which judgment was filed on July 28, 1954.

Dated: August 24, 1954.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs,

By /s/ LEORY R. GOODRICH,
Their Attorney.

/s/ FRANK C. NICODEMUS, JR.,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants:

Bill of complaint.

Amended bill of complaint.

Notice of motion.

Motion of defendant The Western Pacific Railroad Company for summary judgment against the plaintiffs with draft of proposed judgment attached.

Points and authorities in support of motion by defendants Western Pacific Railroad Company for Summary Judgment.

Stipulation.

Motion of The Western Pacific Railroad Corporation, etc., for summary judgment with respondent's return to order to show cause attached.

Acknowledgment of service.

Notice of motion.

Memorandum to the court re contempt.

Order re motions for summary judgment.

Summary judgment.

Notice of appeal filed July 28, 1954.

Cost bond on appeal.

Notice of appeal from summary judgment, filed Aug. 26, 1954.

Designation of record on appeal.

1 Volume of Reporter's transcript of June 11, 1954.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of September, 1954.

C. W. CALBREATH,
Clerk,

By /s/ WM. C. ROBB,
Deputy.

[Endorsed]: No. 14515. United States Court of Appeals for the Ninth Circuit. Western Pacific Railroad Corporation and Alexis I. Du Pont Bayard, Receiver, Appellants, vs. Western Pacific Railroad Company, James Foundation of New York, Inc., and Western Realty Company, Appellees. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed September 16, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14515

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, RECEIVER,

Plaintiffs and Appellants,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Defendants and Appellees.

STATEMENT OF POINTS ON WHICH THE WESTERN PACIFIC RAILROAD CORPORATION WILL RELY

The Western Pacific Railroad Corporation and Alexis I. DuPont Bayard, its receiver, have heretofore appealed to the United States Court of Appeals for the Ninth Circuit from the Order Re Motions for Summary Judgment made by the District Court in the above-entitled matter on June 28, 1954, and from the Summary Judgment made and entered therein by said District Court on July 28, 1954, in Civil Action No. 33514.

Appellants hereby make the following statement of points upon which they will rely on their appeal:

1. That the District Court was in error in mak-

ing its Order Re Motions for Summary Judgment, and in the making and entry of its Summary Judgment. The order and the judgment were made by the Court upon the ground that the claim sued upon, in the above-entitled action No. 33514, was adjudicated and determined in Proceeding No. 26591, reorganizing The Western Pacific Railroad Company, and in the plan of reorganization approved by the District Court and confirmed by the Supreme Court of the United States, 318 U. S. 448, in 1943, and, as alleged by The Western Pacific Railroad Company, by the judgment in the so-called "tax saving case," numbered 26,508 Civil, which was decided by the same District Court on September 6, 1949, and on appeal, in No. 12506, by the Court of Appeals on October 9, 1951.

But the issues which are presented in Action No. 33514, the capacity in which The Western Pacific Railroad Corporation there appears, and the nature and extent of the relief sought, are new and different, and are based upon legal and equitable claims never presented to any court heretofore.

In the original bankruptcy proceeding, The Western Pacific Railroad Corporation appeared as the single stockholder owning all of the common stock of the corporation. It was also a creditor of The Western Pacific Railroad Company, having advanced large sums of money to the operating company as loans. The plan of reorganization adopted by the Interstate Commerce Commission and confirmed by the Courts made no provision for payment of the moneys owed to it by the operating company,

on the ground that the total value placed by the Commission upon the assets of the operating company was less than the total liabilities.

In the "tax saving" case, The Western Pacific Railroad Corporation appeared as the parent corporation and the taxpayer in whose name tax returns were filed, and whose tax credits with the Federal Government, arising out of its stupendous $75,000,000 loss in the bankruptcy of its subsidiary, were used by that subsidiary to effect a saving of $17,000,000 in taxes. In that case the Railroad Corporation appearing as the taxpayer asked the District Court to determine that, under the provisions of the federal statutes, the tax savings made possible solely by reason of the loss, belonged in good faith to the taxpayer who had in fact suffered that loss. This Court in its judgment rendered in 1951 (No. 12506), and the able opinion of Judge Byrne held that the Corporation, because it was the parent corporation, was under a fiduciary duty to its subsidiary to join in consolidated returns and thereby donate its tax credit, and the savings made possible by the use thereof, to the Railroad Company in the interest of its unpaid creditors.

Basing their petition in No. 33514 squarely upon the judgment of this Court, appellants filed their complaint, in No. 33514 Civil, asking on their own behalf and on behalf of the other pre-reorganization creditors whose claims had not been paid, that in like manner and under a like fiduciary duty, the Railroad Company be required to devote the tax savings so received to the benefit of the unpaid and

unsatisfied creditors of the debtor in the bankruptcy proceedings, in whose behalf it was made possible.

That said complaint was filed with full respect to the District Court, and within the terms and provisions of the Final Order of the Court in the bankruptcy action, No. 26591 and the Assumption Agreement entered into by the defendant.

2. That for the same reasons, the District Court was in error in its judgment in the contempt proceeding under the bankruptcy proceeding No. 26514 heard simultaneously with the motions for summary judgment in the foregoing Civil Action No. 33514.

/s/ LEROY R. GOODRICH,
Attorney for Appellants.

/s/ FRANK C. NICODEMUS, JR.,
/s/ WILLIAM MARVEL,
Counsel.

[Endorsed]: Filed September 7, 1954.